

Brexit, Voice and Loyalty: What ‘New Settlement’ for the UK in the EU?

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The UK Prime Minister, David Cameron has finally found time to write a [letter](#) to the European Council President Donald Tusk setting out the basis for the UK's renegotiated membership of the EU. Although in recent weeks, European leaders have complained that they lacked clarity as to what it was that Mr Cameron would seek in these negotiations – despite his recent tour of European capitals – in the end, the themes contained in the letter have been well rehearsed both by the Prime Minister, and more recently by the UK Chancellor in his [speech to the BDI](#) in Germany. There are four pillars to the ‘new settlement’ sought by the UK government: economic governance, competitiveness, sovereignty and immigration. The Prime Minister's stated aim is – through voice – for the UK to remain a member of the EU, albeit an EU with differentiated membership obligations. As he reiterated in a [speech at Chatham House](#) to trail the letter to Donald Tusk, if he succeeds in his negotiations, the Prime Minister will campaign for the UK to remain in the EU. He also made clear that a vote for Brexit would be just that, with no second referendum to seek a better deal. So what then are the key policy planks supporting the four-pillars?

Economic Governance

The underpinning idea of the economic governance pillar is the not unreasonable one that there is potential conflict between those EU Member States that are members of the Eurozone and those that are not. Writing about George Osborne's BDI speech, the [Financial Times](#) reported that German finance minister Wolfgang Schäuble recognized the possible problems that further integration of the Eurozone might pose for non-Eurozone states. What is important about this pillar of negotiations is that it takes seriously [one of the five points](#) that the Director of the Centre for European Reform, Charles Grant made as being key to winning an EU referendum, namely that the UK needs to pursue an agenda that looks beyond a transactionalist and exceptionalist approach to UK membership and seeks to build alliances with other European states.

But the difficulties lie in the details of what sort of legal mechanism might be proposed to achieve mutually assured compatibility between differentiated forms of EU membership. An analogy can be drawn with the sorts of principles enshrined in the treaty to govern and limit resort to ‘enhanced cooperation’: the capacity for groups of EU states to adopt binding rules among themselves. These principles seek to achieve much of what the UK Prime Minister wants in terms of: safeguarding the integrity of the Single Market; making participation in certain aspects of economic governance by non-Eurozone states voluntary; allowing all Member States ‘voice’ if not a vote. But while some of the procedural preconditions may be relatively easy to

enforce, claims of substantive intrusion onto the competences and prerogatives of non-Eurozone states are more difficult areas of compliance and may rely on lengthy and risky legal challenges before the European Court of Justice.

Competitiveness

This pillar is the least concrete of the proposals. At its strongest it suggests targets for reductions in EU regulation. Yet the issue of competitiveness is (a) as much related to the diversity and proliferation of domestic regulatory regimes which concerted EU action might reduce or eliminate and (b) more a function of the quality and efficacy of regulation than it is the quantity of regulation. The UK has long championed the need for better and smarter regulation and will no doubt seek to continue to make that argument. What is less clear is what would or could be new not least in light of the Juncker Commission's '[Better Regulation Package](#)' adopted in May 2015.

Sovereignty

There are four specific building blocks of this pillar.

The first is the demand that any commitment to an 'ever closer union' shall no longer apply to the UK. As George Osborne made clear in his BDI speech, the idea that the EU has more than one currency and that there is a need for safeguards for non-Eurozone states is itself a manifestation that the EU is more diverse and differentiated than implied by a commitment to 'ever closer union'. In that respect, agreement on a specific mechanism to be put in place to protect non-Eurozone states could itself also be a means of achieving this aim. However, the Prime Minister's demand seems more wide-ranging.

References to 'ever closer union' are to be found in the Preambles to the TEU and TFEU and in Article 1 TEU. If the goal was to excise these words then this would require treaty revision under Article 48 TEU. This seems a wholly unlikely option. The EU Charter of Fundamental Rights also contains a reference to ever closer union in its Preamble. It is not a treaty and so in principle Article 48 TEU does not directly apply to its amendment. But that may not actually matter. It would seem more likely that the UK will wish to see a Protocol adopted that will state something along the lines that references to ever closer union in the EU treaties and legislation made under them (there are a number of directives which refer to 'ever closer union' in their recitals) and in the EU Charter of Fundamental Rights shall not be interpreted as applying to the UK including, but not limited to, creating any new or increasing any existing right, duty or obligation enforceable against the UK or by creating any new or expanding any existing competence of the Union when applied to the UK. The precise wording will require careful consideration but it is not in itself an impossible ask. While much attention will be paid to ensuring that the form of the instrument is one which is – or can become – legally binding – so perhaps a European Council decision embodying the wording with a view to that wording being attached to the treaties in a future Protocol – there will, however, remain fears about

how to control the interpretation of such an instrument by the European Court of Justice.

The second and third building blocks appear to be a revised 'early warning system' for national parliaments. The Lisbon Treaty introduced this system as a means of policing the subsidiarity principle. Even collectively, national parliaments cannot veto EU legislative proposals. While the UK Prime Minister is rightly not seeking such a veto for the UK Parliament, his proposal is to enhance the capacity of national parliaments collectively to block proposals.

The fourth block is more specifically related to the UK's wish for a flexible approach to justice and home affairs measures and particularly to defend its right to pick and choose the measures it will adopt.

Immigration

The final pillar relates to free movement. What is interesting about this pillar is where exactly the mechanisms of control will be found. When it comes to any future EU enlargement, then limiting the scope of free movement will be displaced to the accession treaty negotiations where the UK like other EU states will have a veto. There is nothing new in that. More interesting is what the Prime Minister thinks he is going to do about judgments of the European Court of Justice that he does not like. Curiously some of the more recent judgments on access to benefits have been welcomed by the UK government and even by its Eurosceptic press. So it is not entirely clear where Mr Cameron's discontent lies. Finally, the core of this pillar lies in domestic law and not EU law in terms of placing a restriction of four year residence for access to in-work benefits. This is where the Prime Minister is looking less for a renegotiation and instead to challenge the European Commission and the European Court of Justice to enforce principles of free movement and non-discrimination. Strategically this will kick the can down the road but its also a risky gambit. And once again there is the risk that the UK is setting itself on a collision course with the EU courts in much the same way as it has with the European Court of Human Rights. But what remains interesting is the way that the UK will also look to domestic legal routes to achieve its aims of a new settlement (this will also include enshrining the EU's existing Protocol on the application of the EU Charter in domestic law).

Pillars of a New Settlement or a Festive Parlour Game?

The British are keen on parlour games especially as we head into the festive season. The Prime Minister's aim for a more flexible EU able to accommodate the different needs of its constituent Member States seems like a game of 'Twister'. Meanwhile, the competitiveness pillar is more like 'Charades' in which the player attempts to describe something familiar through the less comprehensible medium of mime. The fate of an ever closer union runs the risk of being an example of 'Hide and Seek'.

And the potential for changes in national rules on benefits to incur legal challenges seems like a game of 'Who Blinks First'.

But these are not games and the stake could not be higher. There is scope for sensible, serious and workable proposals to emerge. However, there is a great deal of faith being placed in law as a means of gluing together the European Union. And yet it is often EU law and EU courts that are seen as the source of problems in Europe and it is not clear that a strategy based on securing binding legal commitments will really cut it with the electorate. While delivering a new settlement for the UK may be a necessary condition to avoid Brexit, it is by no means a sufficient condition.

